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February 13, 2018

Hearing Chair Tam Doduc  
Co-Chair Felicia Marcus  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

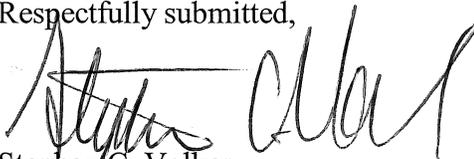
Re: Corrected Consolidated Response of Pacific Coast Federation of Fishermen's Associations and Institute of Fisheries Resources to Hearing Officers' February 8, 2018 Questions and Department of Water Resources February 9, 2018 Filing

Dear Hearing Chair Doduc and Co-Chair Marcus,

Petitioners Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources are submitting a corrected version of their Consolidated Response to Hearing Officers' February 8, 2018 Questions and Department of Water Resources' February 9, 2018 Filing, that makes no substantive changes but merely corrects minor typographical errors that appeared on the following pages:

Page 1, lines 27 and 28:	"If and when" should be "Until"
Page 2, line 16:	"delta" should be "Delta"
Page 2, line 23:	"necessary" should be "necessary"
Page 3, line 4:	"established" should be "establish"
Page 7, line 3:	"CONCLUSION" should be "IV. CONCLUSION"

Respectfully submitted,



Stephan C. Volker

Attorney for the Pacific Coast Federation of Fishermen's  
Associations and Institute for Fisheries Resources

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1 and different Project, the public including PCFFA should not be asked to waste further time  
2 engaged in a process that is irretrievably tainted by the Hearing Team's misconduct, and, in  
3 any event, rendered a nullity by DWR's decision to propose a new and different Project for  
4 which CEQA review has not even been started.

5 This Board's attempt to gloss over the need to terminate this proceeding by propounding  
6 six questions for protestants to answer even before DWR conducts the supplemental CEQA  
7 review that it openly concedes is required does not change the fact that this proceeding must  
8 be terminated now.

9 **II. THIS BOARD'S SIX QUESTIONS ARE TOO LITTLE, TOO LATE.**

10 On Thursday February 8, 2018, at nearly midnight, the Hearing Officers asked six  
11 questions of DWR and other parties, with a deadline of 5 pm on Friday February 9, 2018 for  
12 DWR and noon on the following Tuesday February 13, 2018, for other parties. The Hearing  
13 Officers set an impossibly short deadline – just over two business days – for protestants to  
14 answer fundamental foundational questions regarding the as yet unstudied impacts of DWR's  
15 new and different project to legal users of water, fish and wildlife, public trust resources. The  
16 Hearing Officers even asked the parties to comment on the appropriate Delta flow criteria that  
17 the Legislature directed this State Water Board to adopt in 2010, nearly 8 years ago.  
18 Incredibly, DWR even purported to promulgate new and improved modeling to accompany its  
19 new project on the morning that the hearing was scheduled to begin – February 8 – long after  
20 DWR began planning for this approach with its contractors. By imposing such a foreshortened  
21 deadline for protestants to address DWR's fundamental change in its WaterFix Project, the  
22 Hearing Officers have prevented the careful consideration and review necessary to provide  
23 appropriate answers to the questions raised.<sup>1</sup>

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24  
25 <sup>1</sup> The Hearing Officers asked:

- 26 1. Does the certified final Environmental Impact Report (EIR) address all  
27 potential impacts if the WaterFix Project is constructed and operated in stages?  
In the supplement to the EIR, what additional analyses will be performed and  
what specific environmental issues will be evaluated?  
28 2. If DWR constructs and operates the WaterFix Project in stages, to what  
extent would Reclamation participate during the first stage? Would the WaterFix

1 DWR admits that a final Supplemental Environmental Impact Report for WaterFix,  
2 based on its new, phased approach, will not be available for at least 8 months – October 2018.  
3 Yet DWR asks this Board to move forward with a hearing to determine whether the petition will  
4 “not injure any other legal user of water” and to establish “the extent, if any, to which fish and  
5 wildlife would be affected” and proposals to protect fish and wildlife. Water Code § 1701.2.  
6 The public and public interest representatives such as PCFFA are entitled to this Board’s  
7 compliance with applicable law, including the prohibition against ex parte communications, the  
8 requirement that the Water Board adopt an adequate Bay-Delta Water Quality Control Plan,  
9 the requirement that the Board adopt appropriate Delta flow criteria sufficient to protect fish and  
10 wildlife and other public trust resources, and the required preparation of an Environmental  
11 Impact Report and Environment Impact Statement that fully and fairly address DWR’s new  
12 project, its impacts, and alternatives and mitigation measures that would avoid or reduce those  
13 impacts to insignificance where feasible to do so.

14 Unless and until this Board complies with the law and provides for a proper, objective,  
15 transparent and fully informed process that complies with all applicable environmental laws, no  
16 further proceedings should be held because they needlessly waste precious time and  
17 resources. Accordingly, this Board must terminate the hearing and provide protestants with

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18  
19 Project be operated differently if Reclamation does not participate?

20 3. If the WaterFix Project is intended to be constructed and operated in stages,  
21 is an amendment to the change petition or any additional supporting information  
22 under Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or  
23 why not?

24 4. If the WaterFix Project is constructed and operated in stages, are there  
25 potential impacts to legal users of water, fish and wildlife, the public interest, or  
26 consideration of appropriate Delta flow criteria that would warrant revisiting any  
27 Part 1 or Part 2 key hearing issues? Which issues?

28 5. If a supplement to the EIR is entered into the administrative record, what is  
the most efficient way to address any new information included in the  
supplement?

6. Would any conditions necessary to adequately protect the rights of legal  
users, fish and wildlife, or the public interest be different if the WaterFix Project  
were constructed in stages? Would appropriate Delta flow criteria be different?  
Why or why not?

1 sufficient opportunity to study and address DWR's new plans and new environmental analysis,  
2 if and when they are complete. Protestants must then be afforded an opportunity to prepare  
3 direct testimony once this analysis is complete.

4 **III. PRELIMINARY RESPONSE TO SIX QUESTIONS, SUBMITTED UNDER**  
5 **PROTEST.**

6 In an abundance of caution, PCFFA submits the following preliminary responses to this  
7 Board's six questions. It does so without prejudice to its continuing objection to the Board's  
8 continuation of this hearing in the face of the Hearing Team's unethical misconduct, this  
9 Board's failure to comply with applicable statutory duties, and DWR's abrupt abandonment of  
10 its original project and purported substitution of a new and different project. PCFFA responds  
11 preliminarily to this Board's six questions as follows:

12 QUESTION 1. Does the certified final Environmental Impact Report (EIR) address all  
13 potential impacts if the WaterFix Project is constructed and operated in stages? In the  
14 supplement to the EIR, what additional analyses will be performed and what specific  
15 environmental issues will be evaluated?

16 PRELIMINARY RESPONSE: No, the EIR fails to address the original WaterFix Project's  
17 impacts, let alone the new and different impacts from DWR's new and different Project.  
18 PCFFA does not know what "additional analyses will be performed" by DWR should it prepare  
19 a Supplement to the EIR.

20 QUESTION 2. If DWR constructs and operates the WaterFix Project in stages, to what  
21 extent would Reclamation participate during the first stage? Would the WaterFix Project be  
22 operated differently if Reclamation does not participate?

23 PRELIMINARY RESPONSE: PCFFA does not know "to what extent would Reclamation  
24 participate" in DWR's new and different proposed Project. Nor does PCFFA know what  
25 operational differences would occur should Reclamation not participate. These are questions  
26 that DWR and Reclamation must answer before the public is asked to speculate on these  
27 matters.

28 QUESTION 3. If the WaterFix Project is intended to be constructed and operated in

1 stages, is an amendment to the change petition or any additional supporting information under  
2 Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or why not?

3 PRELIMINARY RESPONSE: Of course an amendment to the Change Petition is  
4 required for DWR's new and different Project, because DWR has previously claimed – falsely,  
5 apparently – that proceeding with a single tunnel rather than the twin tunnels proposed was  
6 infeasible because such a new and different Project would pose substantially new and different  
7 water quality and water supply costs and benefits. For example, in DWR's July 17, 2017,  
8 Finding of Facts and Statement of Overriding Considerations, DWR stated that isolated  
9 conveyance alternatives were "*infeasible*" because they "would cause greater water quality  
10 impacts because of reduced freshwater flows from the Sacramento River into the central and  
11 south Delta," which "would result in water quality impairments in the central and south Delta  
12 due to the fact that there will be less influence from the Sacramento River and more from the  
13 San Joaquin River," and this "would likely cause additional effects to aquatic species through  
14 contaminant bioaccumulation," DWR California Waterfix CEQA Findings of Fact and  
15 Statement of Overriding Considerations ("Findings"), p. 64 (emphasis in original). DWR also  
16 found that "isolated conveyance would cause decreases in surface water deliveries to export  
17 users," and "reduce instream flows and create suboptimal conditions for migration." *Id.* DWR  
18 found that isolated conveyance would have greater significant and unavoidable impacts as  
19 compared to dual conveyance, including harmful impacts on listed species. *Id.*, at 64-67.  
20 Likewise, DWR found that alternatives with fewer than three intakes were "*infeasible*."  
21 Findings, p. 70 (emphasis in original). DWR found that under these alternatives, capacity  
22 would be insufficient to address reverse flows in the south Delta, would allow "fish losses in the  
23 south Delta [to] continue," and would fail to meet the project objectives. Findings, p. 71 (quote),  
24 70-72. Thus, while DWR claims that its new and different project would have fewer impacts  
25 than the WaterFix as approved, DWR's previous Findings indicate otherwise. DWR Opposition  
26 4, 14-15.

27 QUESTION 4. If the WaterFix Project is constructed and operated in stages, are there  
28 potential impacts to legal users of water, fish and wildlife, the public interest, or consideration of

1 appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing  
2 issues? Which issues?

3           PRELIMINARY RESPONSE: Of course there are massive impacts to legal users of  
4 water, fish and wildlife, and to the public interest which require that the key hearing issues in  
5 both Part 1 and Part 2 be “revisited.” The reason DWR has decided to prepare a Supplemental  
6 EIR is because it concedes, openly, that the statutory criteria for preparation of a supplemental  
7 CEQA review pursuant to Public Resources Code section 21166 have been triggered. That  
8 section directs that supplemental environmental review is required if (a) “[s]ubstantial changes  
9 are proposed in the project which will require major revisions of the environmental impact  
10 report,” (b) “[s]ubstantial changes occur with respect to the circumstances under which the  
11 project is being undertaken which will require major revisions in the environmental impact  
12 report,” or (c) “[n]ew information, which was not known and could not have been known at the  
13 time the environmental impact report was certified as complete, [has] become[] available.” *Id.*  
14 PCFFA will not know what “issues” must be addressed until DWR provides the supplemental  
15 environmental review that CEQA requires for DWR’s new and different project.

16           QUESTION 5. If a supplement to the EIR is entered into the administrative record, what  
17 is the most efficient way to address any new information included in the supplement?

18           PRELIMINARY RESPONSE: When and if DWR prepares a supplement to the AR, and  
19 when and if DWR may ask this Board to reinstate review of DWR’s new and different project,  
20 then and only then would PCFFA be in a position to comment on “the most efficient way to  
21 address any new information included in the supplement.”

22           QUESTION 6. Would any conditions necessary to adequately protect the rights of legal  
23 users, fish and wildlife, or the public interest be different if the WaterFix Project were  
24 constructed in stages? Would appropriate Delta flow criteria be different? Why or why not?

25           PRELIMINARY RESPONSE: Of course new and different conditions will be required to  
26 address the new and different impacts from DWR’s new and different project. But the public  
27 and PCFFA will not be in a position to address those new and different impacts, through  
28 imposition of new and different conditions, unless and until DWR provides the public and this

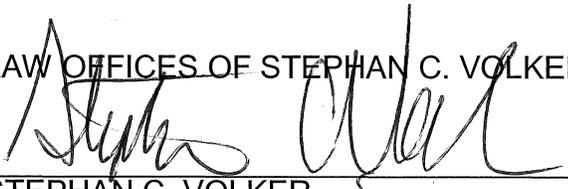
1 Board with the supplemental environmental review required by CEQA.

2 **IV. CONCLUSION**

3 For the foregoing reasons, this Board must terminate this proceeding forthwith.

4  
5 Dated: February 13, 2018

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11 RESOURCES

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